

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Randolph and Commissioners Downey, Karlan, Knox, and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Permanent Adoption of Emergency Regulation 18530.2.

Date: April 16, 2003

Among the changes in law brought by Proposition 34 is section 85306 of the Government Code. Generally speaking, the new law governs the treatment of contributions on hand on the effective date of Proposition 34.¹ While generally requiring a candidate attribute funds to specific contributors when transferring the funds from one committee controlled by the candidate to another committee controlled by the same candidate, the statute contains an exception to that rule when the funds transferred were held by the candidate on the date the proposition went into effect. In January, the Commission adopted emergency regulation 18530.2, implementing the statute. **Staff proposes the Commission adopt permanently regulation 18530.2** with no changes. (Exhibit 1.)

¹ "§ 85306. Transfers Between a Candidate's Own Committees; Use of Funds Raised Prior to Effective Date.

"(a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate. Contributions transferred shall be attributed to specific contributors using a 'last in, first out' or 'first in, first out' accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in Section 85301 or 85302.

"(b) Notwithstanding subdivision (a), a candidate for elective state office, other than a candidate for statewide elective office, who possesses campaign funds on January 1, 2001, may use those funds to seek elective office without attributing the funds to specific contributors.

"(c) Notwithstanding subdivision (a), a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors."

I. BACKGROUND - EMERGENCY REGULATION 18530.2

At its December 2002 meeting, the Commission considered adoption of a fact sheet prepared by staff to assist the public and regulated community in complying with the provisions of the proposition. Several issues were addressed in the fact sheet that entailed application of section 85306 that were also discussed in at least one advice letter (*Fishburn* Advice Letter, A-02-271). The primary issue before the Commission was to determine the scope of an exception to the Act's general requirement that transfers between a candidate's committees must be attributed to specific contributors. In addition, the regulated community inquired regarding the scope of section 85306. At that time, the Commission approved the fact sheet without the section 85306 issues and directed staff to draft an emergency regulation that provided options for the Commission's consideration.

At its January 2003 meeting, the Commission adopted emergency regulation 18530.2. This regulation is set to expire by operation of law on May 31, 2003. The regulation implements several important Commission decisions regarding the scope of section 85306's exception to the attribution requirements for the transfer of funds that were on hand prior to the effective date of the statute. Specifically, subdivisions (a) and (b) state there is no limitation to the number of times a candidate may transfer pre-34 funds (without attributing the funds to specific contributors) to future campaign committees so long as the candidate does not actually expend those funds. To the extent the candidate actually uses pre-34 funds, the amount that may be transferred to future committees without attribution is reduced accordingly.

In January, the Commission examined several options in interpreting section 85306. Before the Commission were three different drafts of the regulation along with a Commissioner-drafted version of the third option, which came to be known as "Knox-Version C." Early in its consideration of the item, the Commission determined as a threshold matter that it did not have the authority to limit the number of times a candidate could transfer his or her own funds to future campaigns of that candidate. This determination was based in large part on the suspicion that such a limitation would face constitutional challenges in light of the *SEIU v. FPPC* line of cases,² as well as doubt as to whether the statute's language was susceptible to such a narrow interpretation. Thus, the debate on the regulation centered largely on whether commingling transferred funds with new contributions in a future election would effectively transform the pre-34 funds into post-34 funds for purposes of the transfer statute (and thus require their attribution for future transfers), and the effect of expenditures from the account on those funds. As indicated above, the Commission determined that the pre-34 funds may be, in essence, segregated from later contributions and preserved for future transfers free of attribution if a committee can meet certain accounting rules.

² *SEIU v. FPPC* (1990) 747 F.Supp. 580 (E.D. Cal.); *SEIU v. FPPC* (9th Cir. 1992) 955 F.2d 1312.

II. STAFF RECOMMENDATION

Staff recommends the Commission permanently adopt emergency regulation 18530.2. Staff has received no comment from interested persons regarding the statute's effect or implementation since January's Commission meeting. Accordingly, it is proposed the Commission permanently adopt the regulation without change to the regulation's text. Staff proposes only the deletion in the regulation's "reference" section to section 82015, defining "contribution." Earlier drafts of the proposed emergency regulation considered in January referred to this statute and those references no longer are part of regulation 18530.2.

Attachment:

1. Proposed Regulation 18530.2.